APPENDIX.

Secs. 2393 and 2426, Mississippi Code of 1930, are as follows:

"2393. POWERS OF MAYOR AND BOARD OF ALDERMEN.—The mayor and board of aldermen of every city, town, and village shall have the care, management, and control of the city, town, or village and its property and finances, and shall have the power to enact ordinances for the purposes hereinafter named, and such as are not repugnant to the laws of the state, and such ordinances to alter, modify, and repeal; and they shall have power."

"2426. THIRTY-THIRD.—MAY PRESCRIBE MAXIMUM RATES AND CHARGES FOR WATER, POWER, LIGHTS OR GAS.—To prescribe by ordinance maximum rates and charges for the supply of water, gas and electric energy or current for lights and power, or either, furnished by an individual, company or corporation to the municipality and its inhabitants, or either, such rates and charges to be just and reasonable. If the rates and charges prescribed be unjust and unreasonable, they may be reviewed and determined by the chancery court of the county, but the authority hereby granted shall not be construed so as to impair the effect or obligation of any valid or binding contract with any waterworks company, electric light company or gas company, now existing or heretofore made."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 779

CITY OF JACKSON, ET AL.,

vs.

MISSISSIPPI POWER & LIGHT COMPANY.

RESPONSE OF MISSISSIPPI POWER & LIGHT COMPANY TO PETITION FOR CERTIORARI, WITH SUPPORTING BRIEF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 779

CITY OF JACKSON, ET AL.,

vs.

MISSISSIPPI POWER & LIGHT COMPANY.

RESPONSE OF MISSISSIPPI POWER & LIGHT COMPANY TO PETITION FOR CERTIORARI, WITH SUPPORTING BRIEF.

PARTIES TO LITIGATION:

City of Jackson (with its officials), Petitioner in this Court, was appellee in the Court of Appeals and defendant in the District Court, herein sometimes called (and so substituted in quotations) City, Petitioner or municipality;

Mississippi Power & Light Company, Respondent here, was appellant in the Court of Appeals and plaintiff in the District Court, herein called (and so substituted in quotations) Company, plaintiff or grantee.

"Opinions Below.

"No opinion was delivered by the District Court, but the judgment correctly appears in the petition herein

(R. 92). The opinion of the Circuit Court of Appeals is set forth, (R. 101 to 105 inclusive), (Appendix C hereto), and the judgment of the Circuit Court of Appeals is correctly set forth in petition herein, (R. 106). Otherwise the opinions and judgments below are not yet officially reported."

Questions Involved.

Whether or not the Federal District Court was deprived by the *Johnson Act* (Judicial Code, Section 24, as amended, 28 U. S. C. A., Section 41(1), 48 Stat. 775, printed as Appendix A) of jurisdiction to declare under *Declaratory Judgment Act* (Section 274(d), Judicial Code, 28 U. S. C. A. Section 400, as amended June 14, 1934, Chapter 512, 48 Stat. 955, as amended August 30, 1935, Chapter 829 Section 405, 49 Stat. 1027, Appendix B) that under the terms of the franchise contract, Exhibit A to the complaint, there is available from the Jackson Gas Field sufficient natural gas for the requirements of the City; or differently, whether or not, there being admittedly an insufficiency of natural gas therein, Company may have thereasto a judicial declaration as to its rights under said Exhibit A between City and Company.

Preliminary Statement.

On June 18, 1940, District Judge Mize dismissed solely for want of jurisdiction, under the *Johnson Act,* a petition for Declaratory Judgment filed by Company against City, seeking a declaration of Company's rights under a written contract, Exhibit A (R. 19), to supply City natural gas, initially to be taken from the Jackson Gas Field, which supply Company claimed had become insufficient for the performance of that thereunder required. This claim the City both judicially and extra-judicially denied. Compare Exhibit "G", Ordinance of the City (R. 76), "There is

now a sufficient supply of natural gas in the Jackson Gas Field *to supply all Jackson consumers.*" (Italics ours, unless otherwise noted.)

Upon appeal, on January 17, 1941, the Court of Appeals for the Fifth Circuit (Hutcheson, Circuit Judge, delivering the opinion), declared:

> "Here the City and the Company, under contractual relations with each other, which oblige the company to furnish gas at rates fixed in the contract while the Jackson Field holds out, and specifically relieve it from so doing when the field has failed, are at loggerheads over the facts upon which their respective rights and duties depend and therefore over their respective rights and duties under the facts.
>
> "The company insists that the field is insufficient, the city that it is sufficient. Acting upon its view, the company has made arrangements for bringing in pipe line gas from a distance and is undertaking to exact and collect for that gas, higher rates than those provided for in the contract. The city insisting that the field is sufficient and the contract still holds is resisting these efforts.
>
> "An authoritative determination as to the present status of the contract and of the rights and duties of the parties under it is essential in the interests of both city and company and of the public that both serve. For such a case, the declaratory judgment act is made to order. Borchard Declaratory Judgments, pages 187, 188, 417, 424, 426, 433, 436, 566, 606, 101 A. L. R. 694."

Thereasto the city seeks certiorari.

Statement of the Case.

Jurisdiction of District Court.

The Company invoked the *Declaratory Judgment Act*, predicating Federal Jurisdiction upon (a) diverse citizenship, (b) rights arising under the Constitution, with jurisdictional amount involved (R. 3).

The Complaint.

The Company operates a gas distribution system at Jackson, Mississippi (R. 3), having

(1) A perpetual franchise granted February 10, 1860 (*Laws Mississippi,* 1860, page 438), pursuant whereto gas works were constructed, a part of which is still operated by Company;

(2) A franchise granted to M. H. Grossman (R. 4);

(3) The contract which is the basis of this controversy, Exhibit A to the Complaint, executed October 20, 1930, and epitomized thus:

Section 2. This franchise was for 25 years and was conditioned on Company "furnishing gas to the City of Jackson and the inhabitants * * *, that is, natural gas shall be furnished to the inhabitants of the City of Jackson *as long as commercial natural gas is produced in commercial quantities* in the City of Jackson * * * *sufficient to supply the demands of the City* of Jackson and its inhabitants and its industries," (herein called Jackson gas or Jackson Field).

> "Should the grantee herein, through any medium, except with the consent of the City of Jackson, raise the rates stipulated in paragraph 3 hereof during the time that gas *is furnished or can be so furnished in the City of Jackson* * * * then the City of Jackson may purchase said property on the terms and conditions hereinafter set forth.
>
> "* * * Company gives option to the City of Jackson to purchase its natural gas equipment * * * the terms of the option" are * * *
>
> "In the event of the raise of rates as designated in paragraph 3 * * * the City will have four months from the effective day of this raise * * *, within which to notify the grantee in writing * * * of

its election to exercise its option to purchase * * *'' at "the true or actual value of the physical properties, properly depreciated at that time." (R. 22.)

Section 3. "Pursuant to the municipality's rate-making power, and the terms and conditions upon which this franchise, is given, the municipality establishes the following rates and charges for natural gas service in Jackson for gas taken from the Jackson, Mississippi, natural gas field * * *'', and therein were then prescribed the following rates, domestic, commercial, heating, industrial and municipal, but all said rates were for gas "taken from the Jackson, Mississippi, natural gas field, * * *."

Section 5. "*Should Jackson gas field * * * become insufficient for the performance of that herein required of* grantee, *it may thereafter,* and not before *obtain natural gas from other fields* and *rates therefore shall be fixed hereunder that are just and reasonable.*"

Section 8. "The grantee shall, as far as practical, furnish gas * * * from and after the date on which this ordinance goes into force and effect to all individuals, businesses and industries, within the corporate limits of the City."

The Company's Complaint then averred:

The Jackson gas field for many months last past, especially at February 7, 1940, and continuously since, was "insufficient for performance of that requires * * *."

Particularizing, in part, thereasto:

(a) Gas is drawn directly from the wells, the demand varies, being greatest between 8 and 9 a. m., (Exhibit B, R. 32). "The maximum available hourly production * * * at January 19, 1940, (was) not in excess of 1,543,000 Cu. Ft. per hour * * * yet the maximum requirements of Company was then and now is (R. 10) 1,778,500 Cu. Ft. per hour for the Jackson system, (Exhibit B-1), with at least

280,900 Cu. Ft. per hour safety factor, (Exhibit B-2), * * *." The demand therefor rapidly is increasing (Exhibit C). "It has increased more than five times since 1930."

Exhibit E is a graphic representation of the decline of gas wells in the Jackson Field. "Said gas wells in said Jackson Field will continue to decline, so that within a period of to-wit, one year or less, there may be no Jackson Gas available at all, but certainly nothing like an adequate or dependable supply." (Exhibit E).

(b) As a public utility, without other gas available than that from the Jackson Field, Company had to anticipate and being advised by the United Gas Public Service Company (herein called United, which was a large furnisher of gas) in 1939 of this condition, a pipeline was constructed, costing more than $3,000,000, making available at Jackson pipeline gas.

(c) Company does not own gas gells, has no contract relation with such owners other than as averred, and the remaining gas "is not available" and renders the supply at Jackson insufficient.

City wrongly pretends there is no insufficiency as from December 26, 1939 to January 25, 1940, 780,000 MCF were withdrawn from the Jackson Field, while the consumption within the City of Jackson was 530,392 MCF. This claim erroneously fails to take into account these essential facts:

(1) The hourly rate of consumption and the gas available to meet the hourly requirement determines the insufficiency of the supply;

(2) Other persons were lawfully entitled to dispose of the gas (R. 13): therefore, not all of the Jackson field gas was available to Company;

(3) Insufficiency must not be allowed to actually occur, but arrangements must be made in advance to give a con-

tinuing dependable supply and Company could not wait until the time of failure to make the supply sufficient;

(4) The wells were being drained and could not meet the hourly requirement.

> "Company avers that notwithstanding the excessive draft, there was not and is not presently, as at February 7, 1940, or at any time since, nor will there be from said Jackson gas field at any time in the future (unless new discoveries are made, which are not now available), natural gas in commercial quantities sufficient in the Jackson gas field to meet Jackson's requirements under said Exhibit A" (R. 14).
>
> * * * * * * *
>
> "This gas is wholly inadequate to supply said City's demand but will cause in said City a gas famine, with disastrous results to all concerned. The right thus to furnish pipeline gas said City wrongfully assumes to deny and thereasto there is between Company and City an actual controversy whereasto a declaration is absolutely requisite and essential."

Company is continuing to serve to Jackson citizens all available Jackson gas, but has been required to the extent of 36.59% to take pipeline gas to supplement the insufficient local supply, and "Company is entitled under said contract to have this right established and adjudged" (R. 15).

> "Wherefore, Company prays * * * upon the final hearing, a declaration be had as between Company and City, * * *, that——
>
> "(a) Under said Contract, Exhibit A, Company has a right, as now, and from February 7, 1940, to furnish in said City pipeline gas, * * *
>
> "(b) That under said contract, Company has the right, if the Court be of opinion that said Company may not so furnish pipeline gas, to discontinue furnishing said City and its inhabitants pipeline gas and to leave

the City solely dependent upon that portion of the gas originating from said Jackson field that Company may supply, and for such other, further, and general relief as in equity and good conscience may seem meet." (R. 17).

City's Motion To Dismiss.

The City moved to dismiss upon divers grounds (R. 88). The Court considered only the *Johnson Act* and dismissed solely because of want of jurisdiction (R. 92). Reversal occurred for the reasons set forth in the opinion of Hutcheson, Circuit Judge, appended as Appendix C. Thereto we refer with great confidence for a thorough vindication of the Company's rights.

Statutes Involved.

Section 24, *Judicial Code,* as amended, 28 *U. S. C. A.,* Section 41, (in full Appendix A), may be epitomized thus:

> "* * * The District Courts shall have original jurisdiction * * * of all suits of a civil nature * * *. Notwithstanding the foregoing provisions of this paragraph, no District Court shall have jurisdiction of any suits to enjoin, suspend or restrain the enforcement, operation, or execution of any order of * * * any rate-making body * * *, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

Pursuant to Section 274d, *Judicial Code,* 28 *U. S. C. A.,* Section 400, Declaratory jurisdiction is provided:

> "(1) In cases of actual controversy *except with respect to Federal taxes* the courts of the United States

shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declarations, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court *having jurisdiction* to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"* * * (Mar. 3, 1911, c. 231, Sec. 274d, as added June 14, 1934, c. 512, 48 Stat. 955; as amended Aug. 30, 1935, c. 829, Sec. 405, 49 Stat. 1027.)"

The sole issue presented to and decided by the District Court was as to the sufficiency, *vel non,* of the Jackson gas field under Sections 2 (R. 20), and 5, (R. 24), under the complaint, as between the Company and the City, to give those rights specifically by the contract, Exhibit A, annexed, to the Company, when the Jackson gas field became "insufficient for the performance of that hereunder required." Thereasto averring such insufficiency, the Company asked declaratory relief.

Hutcheson, Circuit Judge, on appeal, declared, "For such a case, the *Declaratory Judgment Act* is made to order," and excluded from consideration the merits and "the question much discussed in the briefs of both appellant and appellee, with authorities pointing both ways, whether the Declaratory Judgment jurisdiction is discretionary. * * * We are concerned here with questions neither of discretion nor of the merits, but only with whether there was jurisdiction, and we think it plain that there was." (Appendix C.)

Point I.

REPLY TO CITY'S PETITION.

1.

The City overlooks a controlling decision, Maryland Casualty Co. v. Pacific Oil & Coal Co., 85 L. ed. (Adv. Sheets) 455.

Therein, Mr. Justice Murphy stated the facts, in part, thus:

> "Petitioner claimed that this truck was not one 'hired by the insured' and hence that it was not liable to defend the action by Orteca against the insured * * *. It sought a declaratory judgment to this effect against the insured and Orteca, and a temporary injunction restraining the proceedings in the state court pending final judgment in this suit.
>
> "Orteca demurred to the complaint on the ground that it did not state a cause of action against him. The District Court sustained his demurrer and the Circuit Court of Appeals affirmed. 111 F. (2d) 214. We granted certiorari on October 14, 1940 (——— U. S. ———, ante, 56, 61 S Ct 25) to resolve the conflict with the decisions of other Circuit Courts of Appeals cited in the note.[1]
>
> "The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed in its complaint. This raises the question whether there is an 'actual controversy' within the meaning of the Declaratory Judgment Act (Judicial Code Section 274d, 28 USCA Sec. 400), since the District Court is without power to grant declaratory relief unless such a controversy exists. Nashville, C. & St. L. R. Co. v. Wallace, 288 US 249, 259, 77 L ed 730, 733, 53 S Ct 345, 87 ALR 1191; USCA Constitution, Art. 3, Sec. 2.
>
> "The difference between an abstract question and a

---

[1] This point thus decided was adverted to before the Court of Appeals but excluded in its opinion.

'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See Aetna L. Ins. Co. v. Haworth, 300 US 227, 239-242, 81 L ed 617, 620-622, 57 S Ct 461, 108 ALR 1000.

* * *

"It is clear that there is an actual controversy between petitioner and the insured. Compare Aetna L. Ins. Co. v. Haworth, supra (300 US 227, 81 L ed 617, 57 S Ct 461, 108 ALR 1000). If we held contrariwise as to Orteca because, as to him, the controversy were yet too remote, it is possible that opposite interpretations of the policy might be announced by the federal courts. For the federal court, in a judgment not binding on Orteca might determine that petitioner was not obligated under the policy, while the state court, in a supplemental proceeding by Orteca against petitioner, might conclude otherwise. (Citing cases).

"Thus we hold that there is an actual controversy between petitioner and Orteca, and hence, that petitioner's complaint states a cause of action against the latter. However, our decision does not authorize issuance of the injunction prayed by petitioner. (Citing Cases)."

This decision clarifies and settles the right to proceed in the District Court for a declaration, notwithstanding the pendency in the State Court of a complaint. The City, with deference, overlooks that at the same time there was pending before District Judge Mize (a) this complaint for a Declaration; and (b) the complaint by the City for substantially specific performance by the Company. Having

both causes in the same Court, the District Judge remanded one and dismissed the other.

This cause *(Maryland Casualty Company case)* wrought the requisite clarification as to declarations.

2.

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 239-242, 81 L. ed. 617, 620-622, 57 S. Ct. 461, 108 A. L. R. 1000, misapplied.

With deference, this decision of this Court was properly followed and applied by Judge Hutcheson, for the City said the Jackson field was sufficient, the Company said it was insufficient. So assuming, the Company arranged to import pipeline gas to avert a gas famine. The City has fixed no rate for pipeline gas (there being no Public Service Commission and the sole power being in the City to regulate rates). The Company, as the owner of the pipeline gas, collected therefor that which it deemed a reasonable price. *Almaras* v. *Hattiesburg,* 180 So. 394, 181 Miss. 752; *Vicksburg Water Works Co.* v. *Yazoo, etc. Co.,* 102 Miss. 504, 59 So. 825; *Bell* v. *Kaye,* 127 Miss. 165, 89 So. 910.

It was not otherwise provided by statute, hence the Company has the primary right to fix the price of its property sold. 13 *C. J. S.* 277, page 328; *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 564, 63 L. ed. 772, 777; *Interstate Commerce Commission* v. *Alabama, etc. Co.,* 168 U. S. 168, 42 L. ed. 414, 423; *Cincinnati etc.* v. *Interstate Commerce Commission,* 162 U. S. 197, 40 L. ed. 935, 939. Pursuant to this collection by the Company for the pipeline gas thus furnished, the City presently claims an option upon the Company's property and by reason of the sufficiency, *vel non,* there is also brought about an option, *vel non,* whereasto judicial declaration is requisite, neither having aught to do with rates.

When the declaration is made as to sufficiency, *vel non*, it must be assumed that the City will not become a violator of the law and leave undone those things that it ought to do or do those things that it ought not to do. Mr. Justice Reed in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, U. S. Law Week, February 10, 1941, 4187, said:

> "It is a postulate of reasoned thinking that the judicial decrees will be faithfully carried out."

To have the City advise this Court in advance that it should not make a declaration as to a justiciable controversy because the City will not conform thereto, is not a well-conceived argument. It savors of taking advantage of one's own wrong, *(Allegans suam turpitudinem non est audiendus,* Broom's Legal Maxims; 2 C. J. 1148) of challenging constituted authority. We have no doubt when and if it be adjudged as a fact that the Jackson gas field is insufficient, the City will conform to that adjudication. Should it not so do, there is for this failure adequate remedy, (a) under the Declaratory Judgment Act in a Court "having jurisdiction"; (b) independently of this statute, by reason of the inherent power of the Federal Court as a Court. Compare *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112, 48 L. ed. 629, 639; *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 292, 50 L. ed. 477; *Munroe* v. *Raphael*, 288 U. S. 485, 489, 77 L. ed. 910, 24 A. L. R. 1084; *Bethke* v. *Grayburg Oil Co.*, 5 Cir., 89 Fed. (2) 536, Certiorari denied, 302 U. S. 730, 82 L. ed. 564.

3.

City overlooks other controlling decisions of this Court rendering Certiorari not requisite.

Compare *Currin* v. *Wallace*, 306 U. S. 1-5, 83 L. ed. 441; *Nashville, etc. R. Co.* v. *Wallace*, 288 U. S. 249, 77 L. ed. 730, 87 A. L. R. 1191; *United States* v. *West Virginia*, 295 U. S.

463, 79 L. ed. 1546; *Borchard Declaratory Judgment, Annotation* 87 *A. L. R.* 1205; 101 *A. L. R., Annotation* 689.

Wherefore, there is naught further requisite for this Court to do in that regard.

4.

The City overlooks other decisions dealing with the Johnson Act and construing Federal statutes somewhat similar.

(a) Compare *Corporation Commission* v. *Carey,* 296 U. S. 452, 80 L. ed. 325; *Mountain States Power Co.* v. *Public Service Commission,* 299 U. S. 170, 81 L. ed. 101; *Driscoll* v. *Edison Light & Power Co.,* 307 U. S. 108, 83 L. ed. 1134; *Petroleum Exploration* v. *Public Service Commission,* 304 U. S. 209, 214, 82 L. ed. 1294, 1299, and the Fifth Circuit has sought thereto to conform. *City of El Paso* v. *Texas City Gas Co.,* 5 Cir., 100 Fed. (2) 501.

(b) The provision of the *Johnson Act* is no jurisdiction "to enjoin, suspend or restrain the enforcement, operation or execution of any order of any rate-making body," thus directly withdrawing jurisdiction only when that sought was by injunctive process. The *Johnson Act* does not assume to deny jurisdiction of a proceeding to "annul" or "vacate."

Compare the following:

(1) Section 266, where in *Public Service Commission* v. *Brashear Freight Lines, Inc.,* 306 U. S. 207, 83 L. ed. 608, 610, this Court said:

> "Section 266 as originally enacted applied only to cases in which an interlocutory injunction was granted or denied and the purpose was to make interference by such an injunction with the enforcement of state legislation a matter for the adequate hearing and full deliberation which the presence of three judges was likely to secure. Cumberland Teleph. & Teleg. Co. v. Louisiana Pub. Serv. Commission, 260 U. S. 212, 216, 67 L.

ed. 217, 222, 43 S. Ct. 75; Stratton v. St. Louis S. W. R. Co., 282 U. S. 10, 14, 75 L. ed. 135, 137, 51 S. Ct. 8. The amendment that the requirement of a court of three judges should also apply to the final hearing on the application for a permanent injunction was to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction."

Compare *Note,* 83 L. ed. 1193; *Phillips* v. *United States,* 85 L. ed. 460.

(2) *Ex Parte Bransford,* 310 U. S. 354, 84 L. ed. 1249.

(3) Commerce Court, *Procter & Gamble Co.* v. *United States,* 225 U. S. 281, 56 L. ed. 1091, where the excision was to "annul" and "set aside."

(4) Section 316 of the *Packers and Stockyards Act, United States* v. *Corrick,* 298 U. S. 435, 80 L. ed. 1263, 1266.

(5) *Urgent Deficiencies Act* of October 22, 1913, *Shannahan* v. *United States,* 303 U. S. 596, 599, 82 L. ed. 1039, 1041.

(6) *United States* v. *Idaho,* 298 U. S. 105, 109, 80 L. ed. 1070, 1074; *Powell* v. *United States,* 300 U. S. 276, 286, 81 L. ed. 643, 644.

Hence, the excision of jurisdiction by the *Johnson Act* under these decisions would not include the present suit.

5.

Further of the City's Petition with Company's comments thereon and thereasto.

(a) The City sharply presents the issue thus:

"The Company had fully complied with the contract; that the Jackson gas field is *presently insufficient for the performance of the contract;* that Company has sought, obtained and is furnishing pipeline gas from foreign fields at rates initiated by it (Company) but not approved by the City as the rate-making power;

> that the City claims that the Jackson field is still sufficient'',

and with this issue thus put by the City, the prayer of the Complaint is—

(1) Under said Contract, Exhibit A, Company has a right, as at now, and upon February 7, 1940, to furnish in said City pipeline gas, and that the rates prescribed by Section 3 of the Contract do not apply thereto (pipeline gas). That Section 3 rates do not apply was conceded in the City's brief (page 74), ''The only rate agreed upon in the contract franchise we admit is for natural gas from the Jackson gas field, but if that becomes insufficient, within the terms and provisions of the contract franchise, the Company is required to obtain natural gas from other fields, then in the language of the contract 'rates therefor shall be fixed hereunder that are just and reasonable','' but Section 3 (R. 22) can leave no doubt thereasto.

(2) ''That under said contract, Company has the right, if the Court be of opinion that said Company may not so furnish pipeline gas, to discontinue furnishing said City and its inhabitants pipeline gas and to leave the said City solely dependent upon that portion of the gas originating from said Jackson field that Company may supply, and for such other, further, and general relief as in equity and good conscience may seem meet'' (R. 17).

Hence, with this factual controversy existent, whereunder the City would take no step until it was adjusted, this complaint for declaration was filed, and when made, this declaration would, if favorable to the Company, cancel the City's claim for an option upon the Company's plant and place the parties litigant in such a status as that each could do that specifically provided by the contract, for the City had covenanted when pipeline gas was essential, to vouch-

safe thereasto just and reasonable rates. (Section 5, R. 25). So, for Jackson gas, Section 3 prescribed specific rates, for pipeline gas, Section 5 provides for reasonable and just rates, and the contract as an entirety was for judicial construction, as to sufficiency, *vel non,* vouchsafing the respective parties different rights.

(b) The City claims, "We submit, therefore, that this is essentially a rate case," and therefore, any declaration in the District Court would contravene the Johnson Act.

Thereto, the Company replies:

(1) The legislative history thereof in Appendix D demonstrates that there was no withdrawal of jurisdiction in such a cause.

(2) This could never be a rate case,—only a contract case.

Columbus R., Power & Light Co. v. *Columbus,* 249 U. S. 399, 63 L. ed. 669, 6 *A. L. R.* 1684; *note* 74 L. ed. 236; *Texarkana* v. *Arkansas-Louisiana Gas Co.,* 306 U. S. 188, 83 L. ed. 598.

In the *Texarkana Case,* pursuant to a somewhat similar contractual provision in its franchise, the Texas City sought rates operative in the Arkansas City, and this Court said, Off. Ed., page 195, L. ed. page 603:

> "Another bill was filed by the Texas City in *May, 1934,* seeking substantially the same relief * * *. The two actions were consolidated. Later motions, pleadings and the decree in the two cases are the same."

Adverting to the cause as reported 97 Fed. (2), page 7, 5 Cir., Hutcheson, Circuit Judge, said:

> "On *May 22, 1934,* the City secured an order of dismissal of its suit then pending, and on the next day filed substantially the same suit as a new proceeding in the state court. This suit was also removed to the

> Federal court, where, that court holding that the dismissal of the City's petition in the first had not effected dismissal of defendant's counterclaim, the City obtained a reinstatement of its first suit, and an order consolidating the two suits for trial."

The Johnson Act became effective May 14, 1934, and neither this Court, the Court of Appeals nor the District Court thought that such a suit was prohibited by the Johnson Act, and we rely confidently on that decision.

(3) Section 3 of the Contract here covers the rates for Jackson gas—with a 950 B. T. U. content, and not pipeline gas with 1,050 B. T. U. content, (R. 4), wherefor the City, when rates therefor are to be fixed must, Section 5, recognize rates "hereunder that are just and reasonable." So that in the same contract, we have rates for Jackson gas, Section 3, rates for pipeline gas, Section 5, and the sole question hereunder is sufficiency, *vel non,* option, *vel non,* and naught else. When sufficiency or insufficiency is adjudged, the City will be presumed to be law-minded. *Omnia praesumuntur legitime facta donec probetur in contrarium. Broom's Legal Maxims,* 948. *Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium. Broom's Legal Maxims,* 944.

(c) The City's petition contends that the Company is not "at liberty to initiate higher rates for pipeline gas on the assumption that the Jackson field is insufficient."

Our answer is:

(1) The City (with sole power to regulate rates) has not acted thereasto for pipeline gas;

(2) Neither the District Court nor the Chancery Court of Hinds County may fix rates.

3 *Pond Public Utilities,* 4th Ed., 1772, Sec. 892; *Southern Bell Tel. etc. Co.* v. *Railroad Commission,* 5 Fed. (2) 77, authorities supra. No approval of the rates fixed for pipe-

line gas is sought, directly or indirectly. Even if such were sought and such approval were beyond the power of the District Court, just as this Court dissolved the injunction in the *Maryland Casualty Company Case,* so here it could delete from the relief that as to rates. Note the complaint in its entirety was dismissed, and if but one right was claimed therein within the Court's jurisdiction, then as to that right, jurisdiction remained.

(3) There is one factual issue: is the Jackson gas field sufficient or insufficient? On that, the evidence will have to be heard unless this Court should, as would the courts in Mississippi, take judicial knowledge of the reports made to the Oil & Gas Commissioner. As Appendix E, we make reference to supplemental figures filed by the City, showing the absolute necessity of that herein asked, which figures were made a part of the City's brief in the Court of Appeals. Under those figures, in January, 1939, as given, the total consumption in Jackson (which we think is too small) was 419,570 MCF; in February, 1939, 390,046 MCF; in January, 1940, 529,416 MCF; in February, 481,917 MCF; and the total monthly production of the field since May, 1940, has not exceeded 515,669 MCF, and as at November, 1940, had declined to 378,131 MCF, thus balanced against the high point of January, 1940, leaving an actual monthly deficit of 151,285 MCF, and this on the face of the City's interpretation of production figures.

Thereasto, we insert as Appendix E, a graph, adopting, but without admitting the City's figures to be correct, and show the monthly production and the monthly consumption. Therefrom, the Court will see that the monthly production is presently below the monthly consumption in winter weather, and relief might be appropriately had under the City's admission therein made.

(4) The City contends in its statement that "thereby (Company) conceding that more gas is produced in the Jackson field than is distributed by the respondent locally", but, with deference, no such concession is made and for the purposes of the jurisdictional question, it is admitted that the field is insufficient.

(5) We disregard in large measure the contention of the City as to the suit remanded to the State Court because there was in the Court of Appeals, and probably would be here, conflict between counsel as to what therein appeared. Not being in the record, we therefore do not further advert to it.

Point II.

REPLY TO CITY'S BRIEF.

Preliminary Statement.

The City consolidated the Specifications of Error and the reasons for granting the petition into four points in the City's argument, and to avoid prolixity and the overlapping in the Specifications, we reply only to these four.

1.

The City contends this complaint is essentially "a rate case" and the Company may not do indirectly what it cannot do directly, hence the Johnson Act divests jurisdiction.

We reply:

(a) To save prolixity we refer to and reiterate Point I, Subdivision 5 (b). (This is a contract case, not a rate case).

(b) The District Court and the Court of Appeals passed on no question other or further than relief under a contract.

The three sections of the contract wereasto a declaration is sought are as follows:

> Section 2,
> "Natural gas shall be furnished to the inhabitants of the City of Jackson *as long as commercial natural*

*gas is produced in commercial quantities * * * sufficient to supply the demands of the City of Jackson * * * .*"

Section 3,

"Pursuant to the municipality's rate-making power, and the terms and conditions upon which this franchise is given, the municipality establishes the following rates and charges for natural gas service in Jackson *for gas taken from the Jackson, Mississippi, natural gas field.*"

Section 5,

"*Should Jackson gas field * * * become insufficient for the performance of that hereunder required of the Grantee, it may thereafter, and not before, obtain natural gas from other fields * * * .*"

So long as the Jackson gas field was sufficient, though the rates in Section 3 were phenomenally low (being the lowest in the United States except at Monroe, Louisiana, where they were the same), Company did not attack or question that rate structure and does not now do so. The Jackson field has become insufficient.

Pursuant to what Company assumed to be its rights under Exhibit A, it brought into Jackson the requisite gas to supply the deficiency, under a contract with the United, who made deliveries therefor from its pipelines at City Gate, amounting, as at February 7, 1940, to 36.59% of all the natural gas consumed in Jackson. (Tr., 15). Having been compelled to pay to the pipeline for this interstate gas, moving under the *Natural Gas Act*, (15 U. S. C. A., p. 784, 52 U. S. Statutes, 821, Section 717 (a)), Company established as to all consumers at Jackson the ratio existing between the pipeline gas and the Jackson field gas consumed during the month. For the proportion of gas from the Jackson Field, Company charged the Jackson rates prescribed in Section 3. For the proportion of the pipeline gas, it charged reasonable rates, predicated upon the cost of pipeline gas, as to which pipeline gas, the City has not yet taken any regulatory action. The City challenged Company's declara-

tion of insufficiency, declaring by ordinance (Tr., 76), "There is now a sufficient supply of natural gas in the Jackson field to supply all Jackson consumers." The City admits Company's right to supply pipeline gas if the Jackson field be "insufficient".

Herein, the District Court dismissed in its entirety, denying the right of the Company to have even an adjudication as to the option on its property, *vel non,* by reason of sufficiency of the Jackson field, *vel non.* Surely, the existence of an option is appropriate for declaration.

> "The Company contends that a proper construction of the franchise, Exhibit A, in view of the facts prevailing, is that the Jackson gas field is now insufficient for the performance of its obligation under the franchise to supply the City of Jackson, its citizens and its industries, and that, therefore, the Company is free to supply gas derived from sources other than the Jackson field, and under the franchise the Company is not required to continue furnishing gas imported over pipelines at the rates for Jackson field gas prescribed in Section 3 of the franchise contract.
>
> "The nub of the controversy is the fact, *vel non,* of the sufficiency of the natural gas in the Jackson field to supply the City of Jackson, its industries and its inhabitants, within the meaning of the Jackson Franchise contract.
>
> "We now proceed to point out, in the absolute, matters which are not involved in the controversy.
>
> "No question of restraining any order of the governing body of the City of Jackson or any other governmental body is involved. No injunctive relief, directly or indirectly, is sought (R. 20—Section 20 of the Complaint). No application for an injunction has been made by the Company.
>
> "If the District Court upon the merits should find as a fact, under the Jackson franchise contract, that the supply of gas from the Jackson gas field was sufficient for the requirements of the City of Jackson, its

industries and its inhabitants, the Company would be obligated to supply Jackson field gas at the rates prescribed by Sections 2 and 3 of the contract (R. 20, *et seq.*). Inasmuch as in such an event the Jackson gas field would be found sufficient, the question of any obligation or right to supply pipe line gas would cease to be involved.

"On the other hand, if the District Court should find the supply of gas from the Jackson field to be insufficient under the Jackson franchise contract, the company would become entitled under Section 5 of the Jackson franchise contract to supply natural gas from other fields at rates which shall be fixed that are just and reasonable, or to supply artificial or manufactured gas at rates therefor which shall be fixed that are just and reasonable (R. 25).

"Thus, there is nothing injunctive or restraining about any finding which the District Court could properly make in the course of resolving this controversy. Construction of the franchise contract in light of existing facts is all that is involved in the controversy."

(c) By the *Johnson Act*, Federal jurisdiction was divested only where the suit was "to enjoin, suspend or restrain the enforcement, operation or execution" thereof.

This suit does not seek, directly or indirectly, to "enjoin, suspend or restrain the enforcement, operation or execution" thereof.

This suit does not seek, directly or indirectly, the enforcement, operation or execution, but asks that a franchise contract, not an order, be judicially interpreted in order that it may thereafter be put in operation and executed as the parties were by its terms obligated. Compare *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188, 83 L. ed. 598; *Interstate Natural Gas Co.* v. *Louisiana Public Service Commission*, (D. C. La.), 33 Fed. Supp. 50, 59; 34 Fed. Supp. 980.

"There is no substance to petitioner's assertion that the decision of the Circuit Court of Appeals herein con-

flicts even with that of the District Court rendered in 1935 in Mississippi Power & Light Co. *v.* City of Jackson, 9 Fed. Supp. 564. In that case the complaint sought to enjoin temporarily and permanently an Ordinance of the City of Jackson establishing electric rates. It was an out and out rate case, seeking to restrain the rate fixing ordinance, quite apart from any franchise. The case at bar more nearly resembles the case of Anderson, Clayton & Co. *v.* Wichita Valley R. Co., State of Texas, Intervenor, 15 Fed. Supp. 475, affirmed 92 F. (2d) 105, certiorari denied 302 U. S. 747, rehearing denied 302 U. S. 780. In the District Court for the Southern District of Texas, Anderson, Clayton & Company had sought successfully to have determined whether certain shipments of cotton were shipments in "interstate" and "foreign" commerce within certain rate regulations promulgated under the Interstate Commerce Act. The District Court held that the complainant was entitled to a declaratory judgment with respect to the character of the shipments within the purview of those certain rate schedules and that the rate schedules of the Texas Railroad Commission did not apply."

The Jackson gas field is insufficient and Company, therefore, has the right to introduce pipeline gas. The Company may be compelled to serve as a public utility, *State ex Rel.* v. *Benson*, 108 Miss. 779, 67 So. 214. It must make reasonable and proper efforts to accommodate itself to a failure of the gas supply, *Railroad Co.* v. *Blum Co.*, 88 Miss. 188, 42 So. 282; *Yazoo, etc. R. R. Co.* v. *McKay*, 44 So. 780, 91 Miss. 150; *Oklahoma Natural Gas Co.* v. *Corporation Commission*, 88 Okla. 51, 211 Pac. 401, 31 A. L. R. 330, and the Company must be vouchsafed by declaration those rights given by Exhibit A as to putting into operation and execution that validly obtained as to supplying Jackson with pipeline gas when and after the Jackson field became insufficient.

(d) The *Johnson Act* in no way applied, directly or indirectly, to the course of conduct followed in this cause.

(e) Assuming, but not conceding, the franchise contract to have been an order and the action one to enjoin it, yet the *Johnson Act* divested jurisdiction only after reasonable notice and hearing. The City declared that the supply was sufficient, and having thus declared, they would take no further action thereasto. This made, under the decisions of this Court, the *Johnson Act* inapplicable.

(f) The City having declared by ordinance the supply sufficient, without notice, refused to act further, and further approach would have been futile as the City still maintains the supply is sufficient. Hence, no further application was requisite. *Hills* v. *National Albany Exchange Bank*, 105 U. S. 319, 26 L. ed. 1053.

(g) Furthermore, it is very doubtful whether Section 2426 provides a reasonable notice, as required by the *Johnson Act*. Compare *Mississippi Power Co.* v. *Aberdeen*, 11 Fed. Supp. 952; but see *Mississippi Power & Light Co.* v. *Jackson*, 9 Fed. Supp. 564.

(h) Section 2426 may be unconstitutional as assuming to vest this jurisdiction in the Chancery Court. Compare Section 156, *Constitution of Mississippi*, providing:

> "Section 156. The Circuit Court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law."

Section 2426 originated in Chapter 231, *Mississippi Laws* 1904, so that as at 1890, the date of the Constitution, there was no revisory jurisdiction in the Chancery Court and no Court in Mississippi may fix rates. Authorities, *supra*.

(i) *Griffith* v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011 did not involve this statute. As to further litiga-

tion about the water rights in Vicksburg, see *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U. S. 496, 51 L. ed. 1135.

(j) *City of Laurel* v. *Mississippi Gas Co.*, 49 Fed. (2) 219 merely dealt with the right to regulate rates. Presently there are no rates in Jackson for pipeline gas. It may well be that the Company's fixation thereof under the act of 1860 is conclusive whereby the Directors "of said Gas Light Company * * * shall make all needful rules and regulations for the management of said Gas Works and fix the terms and conditions on which gas will be supplied to consumers." *Gulf & Ship Island R. Co.* v. *Laurel Oil & Fertilizer Co.*, 159 So. 838, 172 Miss. 630; *Stone* v. *Y. & M. V. R. Co.*, 62 Miss. 607, 116 U. S. 307, 29 L. ed. 636; *Stone* v. *Illinois Central R. Co.*, 116 U. S. 347.

(k) The City then relies upon *Aetna Casualty & Surety Co.* v. *Quarles*, 4 Cir., 92 Fed. (2) 321, which is not in any way contra, for the same day the same Judge decided *Stephenson* v. *Equitable Life Assurance Society*, 4 Cir., 92 Fed. (2) 406, and in *New York Life Ins. Co.* v. *Roe*, 8 Cir., 102 Fed. (2) 28, 31, our conception is sustained.

All questions as to the merits and the discretion were expressly excluded from consideration by the Court of Appeals, and that presented to the District Court was solely a jurisdictional question. The merits of the controversy were not touched in dismissing, the District Court did so because of the supposed limitation of the Johnson Act. The question of an exercise of discretion as to the propriety of a declaration was not properly before the Court and necessarily is not before this Court on this petition, which does not reach any aspect of the merits, but involves the simple issue of jurisdiction.

The Company has entered upon the discharge of its duty to distribute natural gas from foreign fields and therefore what initially was optional, has become probably obligatory.

2.

The City next contends: "It was never the purpose of the Declaratory Judgment statute to permit the trial of a case piecemeal or to make any adjudication unless it disposes of the whole controversy,"

Whereto, we reply:

(a) These matters substantially covered, *supra.*

(b) These aspects are thoroughly settled, with deference, by the decisions of this Court, and that hereunder sought is well within the rule thus laid down, and if the District Court adjudges the Jackson field insufficient, there will be no difficulty in having the City conform thereto.

(c) Pendency of a suit in a State Court in personam never deprived one entitled to relief in the Federal Court from proceeding there.

McClellan v. *Carland,* 217 U. S. 281, 54 L. ed. 762, 767; *Pennsylvania* v. *Williams,* 294 U. S. 176, 183, 79 L. ed. 814; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 67 L. ed. 226; *Kelleam* v. *Maryland Casualty Co.,* U. S. Law Week, February 18, 1941, 4204.

3.

The city next contends that the pendency of the suit in the Chancery Court remanded thereto by the District Court is a bar to the prosecution of this cause in the District Court.

Thereto we have replied fully, *supra,* and the Court of Appeals expressly refused to pass on this point.

4.

Counsel's final point has to do with "The opinion complained of, we submit, is contrary to the principles announced by other Courts of equal dignity in reference to tax cases."

Our reply is:

The City relies upon:

(a) *Sears, Roebuck & Co.* v. *Roddewig,* 24 Fed. Supp. 321, but this had to do with the Iowa use tax. Compare 292 N. W. 130, 238 Iowa ——, and was reversed by this Court on February 17, 1941, U. S. Law Week, February 18, 1941, 4198, with the Chief Justice and Mr. Justice Roberts dissenting. The Johnson Act was not mentioned directly or indirectly.

(b) *William B. Schaife & Sons Co.* v. *Driscoll,* 3 Cir., 94 Fed. (2) 664, and inadvertently refer to the Johnson Act as having been there involved. With deference, therein Counsel err. Said that Court:

> "By Act of June 14, 1934, c. 512, 48 Stat. 955, Jud. Code, Sec. 274d, 28 U. S. C. A. Sec. 400 and note, Congress authorized the finding of declaratory judgments in certain types of cases in the federal courts. Whatever would have been the status of the case at bar under the original Declaratory Judgment Act, a subsequent Act of Congress of August 30, 1935, c. 829, 49 Stat. 1027, Sec. 405, 28 U. S. C. A. Sec. 400, specifically excluded questions of federal taxation from the operation of the Declaratory Judgment Act."

Note Section 400, *U. S. C. A.,* Title 28, *Judicial Code* 274d.

> "In cases of actual controversy *except with respect to Federal taxes* the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for

such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Compare, also, *Revised Statutes,* Sec. 3224, Sec. 1543, Title 26, *U. S. C. A.:*

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

(c) At another point, the City mentions *Southern Pacific Co.* v. *McAdoo,* 9 Cir., 82 Fed. (2) 121, but therein naught contra is found.

(d) At another point, the City mentions *Automobile Ins. Co.* v. *Freundt,* 7 Cir., 103 Fed. (2) 613, but, note, further, *Chase National Bank* v. *Citizens Gas Co.,* 7 Cir., 113 Fed. (2) 217, and naught contra is found.

(e) At another point, the City mentions *United States Fidelity & Guar. Co.* v. *Koch,* 3 Cir., 102 Fed. (2) 288 in no way conflicts with that herein contended for.

(f) *Lake Erie Provision Co.* v. *Moore,* 11 Fed. Supp. 522, may be disregarded. Compare *Currin* v. *Wallace,* 306 U. S. 1, 83 L. ed. 441.

Hence, there is no such conflict as calls for a uniform rule to be announced here, unifying the law, for, with deference, as to all hereunder claimed, the fundamental decisions applying the principles of law applicable are remarkably harmonious. The City has already had one appeal and is not entitled to another.

The importance of maintaining the Federal jurisdiction is vital to this Company's rights. Hence, this appeal therefor is earnestly made. The opinion of the Court below,

with deference, is correct and the petition should be denied, there being no adequate ground therefor assigned.

Respectfully,
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I, W. E. Morse, of Counsel for Petitioner, acknowledge receipt of copy of the foregoing Response of Mississippi Power & Light Company with Supporting Brief, this the 25th day of February, 1941.

W. E. MORSE,
Of Counsel for Petitioner.